No. 92-65

In the Supreme Court of the United States

OCTOBER TERM, 1992

SUN CARRIERS, INC., ET AL., PETITIONERS

v.

MILNE EMPLOYEES ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state-law tort claim based on the allegation that an employer knowingly made misrepresentations concerning a plant closing to employees covered by a collective bargaining agreement is preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185.

2. Whether respondents' state court claims are preempted by the National Labor Relations Act, 29 U.S.C. 151 *et seq.*

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are Milne Truck Lines (Milne); its parent company, Sun Carriers (Sun), which acquired Milne in 1980; the former owners of Sun; several individuals who were directors of Sun or Milne; and two other trucking companies owned by Sun. In September 1986, Sun sold its stock to some of the individual petitioners in a leveraged buy-out. Pet. App. 3a. At the time of the buy-out, most of Milne's nonsupervisory employees were covered by collective bargaining agreements with the Western Conference of Teamsters (Western Conference).[1]

[1] Twenty-five of Milne's mechanics were represented by lodges of the International Association of Machinists (IAM) under a separate agreement. Pet. App. 3a n.2.

Id. at 2a-3a. Those agreements—the National Master Freight Agreement (Master Agreement) and the Western States Area Supplemental Agreements (Supplemental Agreements)—contained provisions governing the impact of the closing of trucking terminals on the transfer and layoff rights of employees. *Id.* at 10a-11a, 38a.[2]

On September 8, 1987, Milne presented a proposal for midterm wage and benefit concessions to the Western Conference and stated that failure to agree to the concessions by September 11 would force Milne to close down for financial reasons. Pet. App. 3a. The Western Conference rejected Milne's proposal. On September 11, Milne closed all of its 33 terminals and began terminating its employees. *Ibid.*

2. On September 8, 1988, respondent Milne Employees Association (MEA), which was formed for the purpose of conducting this litigation and which represents more than six hundred former Milne employees (Pet. App. 2a, 3a, 32a),[3] filed an action in California state court against petitioners seeking damages for, *inter alia*, fraud, intentional and negligent misrepresentation, and intentional infliction of emotional distress, based on Milne's alleged conspiracy over a nine-month period to deceive its employees about its plans to cease operations.[4] As

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[2] In addition, the Master Agreement (Art. 6, Sec. 2) stated that "[t]he Employer agrees not to enter into any agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement," and further provided that "[a]ny such agreement shall be null and void."

[3] Forty-eight were managerial or other employees not covered by the prior collective bargaining agreements. Pet. App. 2a n.1.

[4] The complaint also asserted claims of breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and interference with prospective advantage. These claims were found preempted by Section 301 by both the district court and the court of appeals (Pet. App. 13a-16a, 39a-41a), and they are not at issue here.

the court of appeals explained (Pet. App. 3a), MEA alleged that Milne's management had come to a decision to shut down before January 1987, but that Milne management personnel held meetings with Milne employees after that date in which the employees were promised job security and asked to refrain from seeking other employment based on assurances that the company would continue in operation.[5]

3. Milne and the other defendants removed the state court suit to federal district court. The district court decided that the state tort claims with respect to the union-represented employees were preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and should be dismissed as barred by the six-month statute of limitations for Section 301 claims. Pet. App. 30a-31a. The Court rejected the contention that the unionized employees' claims were preempted under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), Pet. App. 31a, and it remanded the non-union employees' claims to state court.

4. The court of appeals reversed the district court insofar as it held that the former union members' fraud and emotional distress claims were preempted by Section 301; it upheld the lower court's conclusion that those claims were not preempted under *Garmon*.[6]

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[5] Before the state court action was filed, three Teamsters Locals and the IAM filed unfair labor practice charges with the Regional Director of the National Labor Relations Board. Based mainly on the finding that Milne's bargaining obligation was with the Western Conference and not with the constituent locals, the Regional Director dismissed the charges. See Regional Directors' dismissal letters in Board Case Nos. 31-CA-16740, 32-CA-9183, and 32-CA-9242, attached as Exhibit A to the Defendants' Reply Memorandum in Support of Motion for Summary Judgment in the District Court [hereinafter, Exh. A, Dist. Ct. Reply Memo.]. See also note 14, *infra*.

[6] The court upheld the district court's conclusion that the union members' other nonfraud claims were preempted by Section 301. Pet. App. 13a-16a, 27a; and see note 4, *supra*.

a. In analyzing petitioners' claim of Section 301 preemption, the court stated that the "relevant inquiry is whether resolution of the [state law] claim requires the interpretation of a collective bargaining agreement." Pet. App. 8a (citing *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985)). It concluded that the requirements for preemption were not satisfied because a court resolving the state-law claims would have "no occasion to interpret the collective bargaining agreement itself, in part because these fraud claims do not originate in or refer to rights and duties derived from the * * * agreement." Pet. App. 11a. In analyzing the elements of MEA's state-law fraud claims to determine if their resolution required interpretation of the collective agreement, the court decided that resolution of the first three elements of the fraud claims—misrepresentation, knowledge of falsity, and intent to defraud—did not. They only involved "purely factual questions pertain[ing] to * * * the conduct and motivation of the employer." Pet. App. 9a (citing *Lingle*, 486 U.S. at 407). The court found that the justifiable reliance element of the fraud claims did require the court to "examine" the agreement to consider whether "reliance was justified in light of the [collective] agreements" that were then in force. Pet. App. 9a-10a. The court determined, however, that no provision of the collective agreements "arguably conflicts with Milne's promises regarding its continued operations and employee job security," so there was no need for "interpretation" of the agreement to resolve the state tort claims. *Id.* at 10a.[7]

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[7] The court also ruled that, "[i]nsofar as MEA's emotional distress claim * * * arises from the employees' discharge or termination," it is preempted because resolution of the claim will require interpretation of the collective bargaining agreements' terms relating to layoffs. Pet. App. 17a-18a. However, to the extent the claim arises from the alleged fraud and suppression of facts, it is not preempted because "no provision in the collective bargaining agree-

b. The court also held that the state-law claims were not preempted under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), because the alleged employer misrepresentations did not constitute an arguable failure to bargain in good faith that would bring the conduct within the exclusive jurisdiction of the Board. Pet. App. 18a. Although Milne had a duty to bargain over the effects of its decision to close, the court expressed doubt that Milne's failure to disclose its plans "weeks and months prior to closure" would arguably violate that duty where, as here, Milne eventually revealed its plans and offered to bargain about the effects of closure. *Id.* at 21a. In addition, the court found that, even if the alleged misrepresentations were arguably prohibited by the NLRA, the claim was not preempted under *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978), because the issues presented to the Board would be different from those presented in the tort action. Finally, the court found that the conduct at issue here would fall within the *Garmon* exception for conduct that implicates "deeply rooted" local interests because the State "has a 'substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.'" Pet. App. 25a (quoting *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 511 (1983)).

DISCUSSION

The court of appeals properly applied the principles set forth in *Lingle*, *supra*, to conclude that respondent MEA's state-law fraud and emotional distress claims were not preempted by Section 301. Since there is no conflict in the circuits regarding the application of this Court's Section 301 authority to the specific issue presented, further review of petitioners' claims under Section 301 is not

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ments before us defines standards for * * * false representations to employees outside the collective bargaining process regarding continued company operation." *Id.* at 18a.

warranted. Although we disagree with the court of appeals' reasons for concluding that the state tort claims were not preempted under *Garmon*, *supra*, review of that question is similarly unwarranted. The lower courts are not in conflict regarding the application of *Garmon* to facts such as those at issue here. Accordingly, the petition for certiorari in this case should be denied.

1. a. This Court has held that Section 301 of the LMRA preempts not only lawsuits to enforce the terms of collective bargaining agreements, but also lawsuits in which "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 220. In *Lingle* v. *Norge Div. of Magic Chef, Inc.*, *supra*, the Court held that, even though the employee in that case was covered by a collective bargaining agreement containing a "just cause" discharge clause, a state tort claim of retaliatory discharge was not preempted because its resolution involved "purely factual questions" pertaining to the conduct of parties and "does not require construing the collective bargaining agreement." 486 U.S. at 407. The Court stated that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for [Section] 301 pre-emption purposes." *Id.* at 410.

Petitioners contend (Pet. 12-13) that the court of appeals misapplied *Lingle*, because evaluation of the justifiable reliance element of the fraud claim requires interpretation of the labor contract provisions that concern "protections, rights and duties" in the event of plant closure, the employer's "right to shut down," and the effect of conflicting extracontractual agreements. See Pet. 11-13 & n.5. Petitioners maintain that the "clear conflict" between Milne's rights under the contract and the individual promises it allegedly made to employees concerning its continued operation "foreclose[s] reasonable reliance" and defeats the employees' fraud claims.

We disagree with petitioners' analysis in two important respects.

(i) Even assuming the collective bargaining agreement grants Milne the authority to close terminals at any time, it does not reserve to Milne the right to make false statements regarding its intentions to close terminals in a manner that causes damage to others. Milne's exclusive right to determine when and whether to close terminals could not relieve it of the state-law obligation to refrain from lying about its intentions regarding exercise of that right, and thus could have no bearing on whether the company committed fraud under state law. As this Court observed in *Allis-Chalmers* v. *Lueck*, 471 U.S. at 212, the LMRA "does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." Since the employer's duty not to mislead its employees to their detriment derives from "state rules that proscribe conduct, [and] establish rights and obligations, independent of [the] labor contract," it would be "inconsistent with congressional intent" to find preemption of an action based on a violation of that duty. *Ibid.* Thus, although other circumstances could conceivably undercut the reasonableness of the employees' reliance on the employer's representations, the fact that the decision whether to close terminals was within Milne's exclusive authority could not, in itself, render unreasonable the employees' reliance on Milne's promises not to close. Because the existence of Milne's asserted contractual authority has little relevance to the merits of respondents' state fraud claim, the validity of the state claim is not "dependent" on any clause in the contract that might establish the employer's rights to close terminals. See *Lingle*, 486 U.S. at 408-409.[8]

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[8] Likewise, contract provisions governing job security in the event of closure have no substantial relevance to this dispute. As the court of appeals correctly observed, "MEA's claims arise from alleged promises that the company would not close, and not from promises regarding rights or procedures entitled to them if the

(ii) The need to examine a collective bargaining agreement to decide in the first instance whether the requirements for preemption are met should not be equated with the process of "interpreting" the contract to dispose of the merits of the state-law claim itself. Only when the terms of the collective bargaining agreement affect the outcome of the state-law dispute is preemption triggered under *Lingle*. Cf. *Consolidated Rail Corp.* v. *Railway Labor Executives Ass'n*, 491 U.S. 299, 303 (1989). See also Pet. App. 12a (in this context, "an examination is not interpretation"). As the Court stated in *Lingle*, 486 U.S. at 413 n.12 (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 211), "not every dispute * * * tangentially involving a provision of a collective bargaining agreement, is preempted by § 301."[9] Where, as here, the initial examination of a contract reveals that the state claims are not "contract dependent"—because no provision of the contract determines state-law liability—adjudication of the state claims should be permitted to go forward. Otherwise, employers could trigger preemption and deprive em-

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company closed." Pet. App. 11a. Also irrelevant to the claim is the provision barring employer-employee agreements that "in any way conflict[]" with the contract's terms, *id.* at 10a. Respondents do not contend that the employer's statements created individual contracts giving rise to a state claim for their breach, but rather that the statements constituted fraud. Moreover, as we discuss below, the mere fact that the court was required initially to examine the "no conflicts" clause in addressing the preemption question did not make the outcome of the state claim "dependent" on that term within the meaning of *Lingle*. See pp. 8-9, *infra*.

[9] Indeed, the Court in *Lingle*, 486 U.S. at 413 n.12, recognized that "a state-law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby preempted."

ployees of state-law remedies merely by claiming, however implausibly, that the disposition of a state claim turned on some provision of the contract, thereby forcing a court to "interpret" the contract to decide that the contract did not bear on the outcome of the state lawsuit.[10]

b. Petitioners contend (Pet. 8-10; Reply Br. 2-6) that this case presents a conflict in the circuits respecting the application of the principles of *Lingle*. Although two post-*Lingle* cases[11] dealing with plant closings have held

[10] In contending further (Pet. 15-16) that permitting state tort suits involving the employment relations of unionized employees will result in the "disintegration of the arbitration process" because employees will "sidestep" grievance procedures, petitioners simply quarrel with the logic of *Lingle*, see 486 U.S. at 409-410. The Court in that case recognized that its preemption doctrine contemplated the availability of parallel remedies under grievance/arbitration procedures and state law for similar employer misconduct.

[11] A number of the cases cited by petitioners (Pet. 9-10; Reply Br. 4) predate *Lingle*, and thus were decided without benefit of the Court's decision in that case. See *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); *Darden* v. *United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987); *Strachan* v. *Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby* v. *Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987). *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988), was decided less than a month after *Lingle* and does not discuss *Lingle*.

Petitioners contend (Pet. 9 n.4) that the courts are also in conflict over whether state claims may be preempted under Section 301 on the basis of an employer defense invoking the terms of a collective bargaining agreement, see, *e.g.*, *Schacht* v. *Caterpillar*, cert. denied, 112 S. Ct. 1306 (1992) (No. 91-1095), or on the basis of individual pre-hire agreements concerning terms and conditions of employment. Neither of these issues is properly presented here. The court of appeals did not reject petitioners' preemption claim based upon the view that the contract terms were relevant only to a defense. But cf. *Smith* v. *Colgate-Palmolive Co.*, 943 F.2d 764, 770-771 (7th Cir. 1991) (employer's argument that reliance is unreasonable under labor contract treated as defense to fraud claim). Nor is there any issue respecting individual agreements, since respondents' claim sounds in tort, not in breach of individual employment contracts. See note 8, *supra*.

state fraud claims preempted, it is not at all clear that those courts of appeals would have found petitioners' claims preempted. As the Court in *Lingle* cautioned, preemption of claims based on a state-law duty depends on the particular duty at issue and the precise terms of a collective agreement, which can vary considerably from case to case. We accordingly do not believe that certiorari is required to resolve a conflict in the circuits.[12]

In *Dougherty* v. *American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990) (Pet. 10), unionized employees contended that the defendant company fraudulently induced them to transfer to another plant by failing to disclose plans to reduce the workforce at that plant in the future. Relying on this Court's opinion in *Allis-Chalmers Corp.* v. *Lueck*, *supra*, the court found that the company's "obligations to provide accurate information" concerning its intentions were "inextricably inter-

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[12] There is not even an arguable conflict between the decision below and *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992) (Reply Br. 4). In that case, the court found that a state invasion-of-privacy claim based on the employer's surveillance of a company locker room was preempted. Resolution of the state claim depended on whether the employer "invaded [employees'] objectively reasonable expectation of privacy," which depended on whether the "management rights" provision of the labor contract had reserved to the employer the right to conduct unlimited surveillance of its premises. 964 F.2d at 710. See also *McCormick* v. *AT&T Technologies, Inc.*, 934 F.2d 531, 533, 536 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 912 (1992). In the instant case, in contrast, the contract did not undermine the reasonableness of the employees' reliance on Milne's statements concerning plant closings: Although Milne had the right to close its terminals, it did not reserve the right to misrepresent its intentions to close its terminals.

The Ninth Circuit has in fact found preemption of state invasion-of-privacy claims where the expectation of a right to privacy required an interpretation of a collective bargaining agreement. See *Stikes* v. *Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990) (discharge for refusal to submit to random search for theft screening), cert. denied, 111 S. Ct. 2015 (1991); *Schlacter-Jones* v. *General Telephone*, 936 F.2d 435 (9th Cir. 1991) (drug testing).

twined" with the collective bargaining agreement, which had been modified to "define the employment rights of transferred employees." The court appears to have concluded that any duty on the part of the employer to disclose future workforce reduction would arise, if at all, under the contract. However, the court's discussion of the contract is not sufficiently detailed to make clear how its contents might be relevant to the existence or violation of such a duty. Thus, it is difficult to say whether *Dougherty* is inconsistent with the decision below.

In *Smith* v. *Colgate-Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991) (Pet. 10), the court held that state law claims were preempted because the reasonableness of the employees' reliance on promises of a "permanent job" at a plant to which they transferred after a plant closure required interpretation of a collective bargaining agreement. The terms of the contract had the effect of divesting the employees of their seniority for purposes of layoffs at the new plant, 943 F.2d at 771, and also contained a broad "merger clause." The merger clause stated that the agreement "embodies all the terms and understandings which the Company and the Union have made with respect to the company's plant" and was binding on all union employees. *Id.* at 765[illegible]. The court held that the reasonableness of the employees' reliance on the promises that their positions at the new plant would be "permanent" would "inevitably turn" on the interpretation of these clauses of the contract. *Id.* at 771. The court of appeals appears to have decided that the test for preemption was satisfied because a jury hearing the state law fraud claim would have to determine whether employees who were divested of certain seniority rights under the contract could reasonably believe that they would not be laid off. *Id.* at 769. In contrast, the court of appeals in this case concluded that the terms of the contract at

issue here did not even arguably refute the reasonableness of the employees' reliance. Pet. App. 10a.

In summary, the difference in outcome here and in the cases cited by petitioners may well turn on differences in the facts and claims at issue rather than on a disagreement over the correct legal standard or its application. Thus, there is no clear conflict in the courts of appeals regarding the analysis of the Section 301 preemption issue presented in this case.

2. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Court required the States to "defer to the exclusive competence of the National Labor Relations Board" to regulate activity arguably protected or arguably prohibited by the National Labor Relations Act (NLRA). *Id.* at 245. However, the Court excepted from this rule conduct that is "a mere [] peripheral concern" of the NLRA and activity that "touche[s] interests so deeply rooted in local feeling and responsibility" that, absent "compelling congressional direction," preemption cannot be inferred. *Id.* at 243-244. See also *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983). In *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court added that state claims arising out of conduct that was arguably prohibited by the NLRA are not preempted unless "the controversy presented to the state court is identical to * * * that which could have been * * * presented to the Labor Board." *Id.* at 196-197.

Applying these principles, the court of appeals found that respondents' state fraud claims were not preempted under *Garmon* because the conduct alleged was not arguably prohibited by the NLRA, and, in any case, the controversy presented to the Board would be different from the issue presented in the state court action. Although we believe that the court of appeals incorrectly analyzed the range of conduct arguably prohibited by the NLRA, and that petitioners' assertion that there is

sufficient similarity of claims to warrant preemption finds some support in this Court's precedents, we do not believe the issue is ripe for review. No other court of appeals has decided the preemption issue presented here in a manner inconsistent with the decision below.

a. The court of appeals erroneously concluded that petitioners' misrepresentations to individual employees were not part of a pattern of conduct that was arguably prohibited by the NLRA (and therefore within the Board's jurisdiction) because those statements could have had no bearing on whether petitioners failed to "engage in effects bargaining with the union at a meaningful time" in violation of the Act, see Pet. App. 21a. The court explained that the Act could not have required Milne, in fulfilling its obligation to engage in meaningful bargaining over effects, to reveal a decision to close "weeks and months prior to closure." *Ibid.* That statement misreads Board precedent, under which an employer's obligation to reveal its plans to close a facility could, depending on the circumstances, accrue as soon as those plans become definite.[13] Thus, in adjudicating an unfair labor practice

[13] The court of appeals recognized that, although the decision to close part of an employer's business for economic reasons is not a mandatory subject of bargaining, the employer must bargain in good faith with the employee representative about the effects of such a decision "in a meaningful manner and at a meaningful time." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 682 (1981). The Board has long held that, to fulfill this obligation, an employer must provide a union with sufficient notice of an impending closure to permit the union to engage in meaningful bargaining concerning effects. See *Royal Plating & Polishing Co.*, 160 N.L.R.B. 990, 994 (1966) (citing cases). The Board has interpreted this requirement to mean that, absent special circumstances, an employer may not conceal its decision to close if that concealment would permit the employer to avoid bargaining until "the collective strength of the employees' bargaining unit ha[s] been dissipated." *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 389 (1968). Accord *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), enforced, 819 F.2d 1130 (2d Cir. 1987); *Kirkwood Fabricators, Inc.*, 285 N.L.R.B. 33, 35 (1987), aff'd, 862 F.2d 1303, 1306-1307

charge, it would be possible for the Board to hold that, if respondents' allegations that Milne made the decision to close the plant before January 1987 were true, petitioners' conduct in failing immediately to reveal that decision (and in subsequently misrepresenting to employees that the plant would remain open) constituted a refusal to bargain in good faith in violation of the Act. At the very least, Milne's alleged fraudulent concealment of its plan to close its terminals would have some bearing on the question whether Milne fulfilled its duty to bargain in good faith with the union over the effects of its decision to close.[14]

(8th Cir. 1988); *Riedel International d/b/a Willamette Tug & Barge Co.*, 300 N.L.R.B. 282 (1990); see also *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26-27 (1st Cir.), cert. denied, 464 U.S. 892 (1983).

The court mistakenly cited (Pet. App. 21a) *Creasey Co.*, 268 N.L.R.B. 1425 (1984), for the proposition that an employer is never obligated to give notice of a plant closing weeks or months before it takes place. *Creasey*, however, stands for the proposition that an employer may delay effects bargaining in good faith when there are overriding business justifications for doing so. The Board in that case found that the employer's need to dispose of perishable inventory justified delaying notification of a closure decision until four days before the plant actually closed.

[14] The court of appeals also stated that, in dismissing unfair labor practice charges filed against Milne, "the Board itself implied that [the company's] notice to the Teamster bargaining agent in late August 1987 * * * satisfied its duty to bargain in good faith." Pet. App. 21a. However, the Board never had occasion to decide whether the company satisfied its duty to bargain over the effects of the closing. The comments to which the court of appeals refers were made by the Regional Director in the course of dismissing charges brought, not by the employees' bargaining representative, the Western Conference, but by a constituent local. Moreover, the local did not question the adequacy of effects bargaining in that charges, but rather accused Milne of repudiating a previous collective bargaining agreement and engaging in direct bargaining with employees. See Exh. A, Dist. Ct. Reply Memo.; see also Br. in Opp. 14. Although the locals brought additional charges concerning Milne's closure, the Regional Director dismissed them chiefly

b. The court of appeals' application of the second requirement for *Garmon* preemption stated in *Sears*—that a controversy be "identical to * * * that which could have been * * * presented to the Board," 436 U.S. at 197-198—is also open to question in light of this Court's later decision in *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983). See Pet. App. 24a. In *Jones*, a company employee alleged that a union had caused an employer not to keep its promise to hire him for the job of construction supervisor. The Court acknowledged that the state cause of action was broader than the controversy before the Board: under state law *any* tortious conduct that interfered with contractual relationships was actionable, whereas such conduct was arguably prohibited by the NLRA only if the union was found to have "intimidated and coerced" the employer into breaking the contract. 460 U.S. at 682. Although the state law claim and the unfair labor practice violation in *Jones* shared only some elements, the Court nevertheless found the state claim preempted. The Court ruled that it was sufficient that the "same crucial element" had to be proved in both the state tort action and the proceedings before the Board: "the discharge must be shown to be the result of Union influence." *Ibid.*

In this case, the court of appeals found (Pet. App. 24a-25a) that petitioners' state-law claims would not present an "identical controversy" to the one that could have been presented to the Board. The court reasoned that, although the controversies overlapped in some respects, the Board would necessarily focus on the impact

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because Milne had no obligation to bargain with the charging unions, but only with the Western Conference. The IAM, which represented some of Milne's employees, did file a charge challenging the adequacy of effects bargaining, but it was withdrawn. The Western Conference did not file any charges at all, and never complained about the timeliness of the effects bargaining. See Exh. A, Dist. Ct. Reply Memo.; note 5, *supra*.

of the alleged misrepresentations on the unions and the bargaining process, whereas the state court would look to the impact of those misrepresentations on the employees. The court of appeals did not discuss the application of the *Jones* decision at all, and thus failed to address whether the state law claims could be said to share a "crucial element" with any unfair labor practice charge that could have been brought before the Board. Instead, the court of appeals relied on the Court's decisions in *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), and *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), to find that this case fit into the exception to preemption for conduct that implicates interests "deeply rooted in local feeling and responsibility," see *Garmon*, 359 U.S. at 243-244. The court explained that "California has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm." Pet. App. 25a (quoting *Belknap*, 463 U.S. at 511).

c. We do not believe it is necessary for the Court to determine how to harmonize the principles of *Belknap*, *Sears*, and *Jones* in analyzing this case, because the courts of appeals have not come to different conclusions concerning the *Garmon* issue presented here. While several courts of appeals have considered whether the NLRA preempts state fraud and emotional distress claims arising from employer conduct having some relation to plant closings, preemption has been predicated upon allegations that the misrepresentations occurred in the course of, or as an outgrowth of, formal collective bargaining. The employer conduct in this case took place in a very different context.

In *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), for example, the employees filed a state-law fraud action based upon promises and statements made by the company during the course of active bargaining with the union following the company's announcement that it would close a

plant unless the union made wage and benefit concessions. The court of appeals held that the action in state court was preempted under *Garmon*, reasoning that the state claims "are in substance allegations that the Company breached its duty to bargain in good faith in negotiating the concessions and in failing to reveal the likelihood of a plant closure despite the concessions." 855 F.2d at 1516.

Similarly, in *Kolentus* v. *Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987), the employees alleged that the employer committed fraud by misleading the union, during collective bargaining, concerning the employer's intention to close a plant. See 798 F.2d at 960. The court of appeals concluded that, because the complained-of conduct occurred during a period in which the employer had an ongoing duty to bargain with the union, "the controversy presented by the state claim is identical to that which could have been presented to the NLRB." *Id.* at 961. The state fraud claim in *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), was also based on alleged misrepresentations made by company representatives during concession negotiations with the union and during meetings with employees considering ratification of a proposed concession agreement. The plaintiffs claimed that the employer lied about its intention to rebuild a plant, and that, after the agreement with the union went into effect, the employer failed to disclose its intention to shut down. See 790 F.2d at 1282-1283. The court reasoned that, because the employer's conduct underlying the state court claim took place during the bargaining period, the misrepresentations and failure to disclose "arguably would be prohibited by the Labor Act as bad faith bargaining." *Id.* at 1283.[15]

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[15] The state tort allegations in *Serrano* were based in part on a failure to disclose the impending plant closure after the concession agreement was signed. The court reasoned, however, that "[s]ince the duty to bargain unquestionably extends beyond the period of

Thus, in *Serrano*, *Parker*, and *Kolentus*, the employer conduct forming the basis of the state tort claims occurred in the course of, or as an outgrowth of, formal contract negotiations with the union. The employee lawsuits were directed at reforming the collective agreement and recouping contract benefits the employer had obtained through fraud. Therefore, there was little question that the challenged employer conduct was part of the collective bargaining process subject to exclusive regulation by the Board. In this case, in contrast, the employer's alleged misrepresentations were made to individual employees rather than to the union, outside the context of formal bargaining, and before it was clear that negotiations related to the plant closing should have begun. It would appear that this is the only case that has considered the issue of *Garmon* preemption under these circumstances, and there is reason to believe that other courts might well resolve a similar case in the same way. See *Wells* v. *General Motors Corporation*, 881 F.2d 166, 171 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990).[16]

In sum, the courts in *Serrano*, *Kolentus*, and *Parker* did not have occasion to decide whether the type of employer conduct at issue here was related to a violation of the duty to bargain in a manner that brought the conduct

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contract negotiations, defendant had the duty to disclose any information they had concerning a shutdown * * * as it related to the [bargaining agreement] during the entire period of that agreement." 790 F.2d at 1283 (quoting district court opinion).

[16] The court of appeals in *Wells* considered state fraud claims that were based on efforts by an employer "to induce individual employees to accept [voluntary termination] benefits," after an agreement negotiated by the union had been signed. In finding that there was no preemption, the court reasoned that the employer's alleged inducements "had no direct bearing upon the collective bargaining process" and thus were made outside the bargaining context. Although there arguably is some tension between *Wells* and *Serrano*, those cases are factually distinguishable from, and not inconsistent with, the decision below.

within the Board's exclusive jurisdiction. Therefore, contrary to petitioners' suggestion, there is no disagreement in the circuits regarding the *Garmon* preemption issue presented by this case. Because *Garmon* preemption will often turn on differences in the circumstances of the employer's conduct, the preemption analysis is intensely fact-specific. We accordingly think that review of the question here should at least be postponed until other courts of appeals have had an opportunity to consider the application of *Garmon* to more directly analogous conduct.[17]

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[17] There is no merit to petitioners' contention (Pet. 21-23) that the state-law claims should be found preempted because they are based on representations to individual employees that could arguably form the basis for a charge before the Board of direct dealing or a unilateral change in the collective bargaining agreement in violation of the NLRA. As the court of appeals correctly found, the company's assurances to employees concerning job security could not reasonably be regarded as the type of direct bargaining in derogation of the union's authority of which this Court disapproved in *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944). Not only is this decision consistent with the Court's precedents concerning direct dealing with unionized employees, but petitioners have not alleged any conflict in the lower courts' application of those principles in the context of a claim of *Garmon* preemption based on possible direct dealing. Thus, even if that argument for preemption had some merit, there would be no reason for this Court to grant review to consider that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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